Supreme Court, U.S.
FILED
APR 17 2002

No. 01-1044

In the Supreme Court of the United States

MAGIC CHEF COMPANY, PETITIONER

v.

UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

THEODORE B. OLSON
Solicitor General
Counsel of Record
ROBERT D. MCCALLUM, JR.
Assistant Attorney General
ANTHONY J. STEINMEYER
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Title 28 U.S.C. 2410(a) waives sovereign immunity for suits against the United States "(1) to quiet title to [or] (2) to foreclose a mortgage or other lien upon * * * real or personal property on which the United States has or claims a mortgage or other lien." Section 2410(c) requires that "an action to foreclose a mortgage or other lien, naming the United States as a party under this section, must seek judicial sale," but it does not require a judicial sale in an action to quiet title. 28 U.S.C. 2410(c). Petitioner sold kitchen appliances to a developer which subsequently failed to pay for them. The Department of Housing and Urban Development (HUD) obtained possession of the appliances when it took possession of the project following the developer's default, and HUD also held a perfected security interest in the appliances. The question presented is whether petitioner's replevin action to recover the appliances under Florida law is an action to "quiet title" within the meaning of Section 2410(a) so as to be exempt from the judicial-sale requirement of Section 2410(c), rather than an action to foreclose on a lien, which would be subject to the judicial-sale requirement.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	5
Conclusion	10

TABLE OF AUTHORITIES

Cases:

Brotherhood of Locomotive Firemen v. *Bangor & Aroostook R.R.*, 389 U.S. 327 (1967)	6
Estate of Johnson v. *United States*, 836 F.2d 940 (5th Cir. 1988)	7
Harmon v. *United States*, 101 F.3d 574 (8th Cir. 1996)	7
Harrell v. *United States*, 13 F.3d 232 (7th Cir. 1993)	8
Progressive Consumers Fed. Credit Union v. *United States*, 79 F.3d 1228 (1st Cir. 1996)	7
United States v. *Coson*, 286 F.2d 453 (9th Cir. 1961)	7
United States v. *John Hancock Mut. Life Ins. Co.*, 364 U.S. 301 (1960)	5
United States v. *Morrison*, 247 F.3d 285 (5th Cir. 1957)	7
Virginia Military Inst. v. *United States*, 508 U.S. 946 ((1993)	6
Williams Mgmt. Enters., Inc. v. *Buonauro*, 489 So. 2d 160 (Fla. Dist. Ct. App. 1986)	5, 8

Statutes:

28 U.S.C. 2410	3, 5
28 U.S.C. 2410(a)	3, 4, 6-7, 9
28 U.S.C. 2410(c)	3, 4, 5, 9

Statutes—Continued: Page

Fla. Stat. Ann. (West 2000):
§ 78.01 8
§ 713.001 *et seq.* (& Supp. 2002) 4
§ 713.01(7) (Supp. 2002) 4
§ 713.08 2
§ 713.15 ..... 4, 5, 8

In the Supreme Court of the United States

No. 01-1044

MAGIC CHEF COMPANY, PETITIONER

v.

UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is unpublished, but the decision is noted at 264 F.3d 1144 (Table). The four opinions of the district court (Pet. App. 13a-14a, 16a-19a, 20a-25a, 27a-40a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 26, 2001. A petition for rehearing was denied on October 12, 2001. Pet. App. 41a. The petition for a writ of certiorari was filed on January 10, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case involves competing claims for 281 refrigerators and 282 ranges delivered to a residential project being constructed in Florida. Pet. App. 2a, 30a. The Department of Housing and Urban Development (HUD) insured the mortgage on the project. When the owner, Bonaventure Retirement Associates (Bonaventure), defaulted, HUD became the successor in interest to the lender's perfected security interest, which included all personalty and fixtures relating to the project. *Id.* at 30a.

Petitioner sold the appliances to Bonaventure and delivered them to the project. Pet. App. 2a. After Bonaventure failed to pay for them, petitioner filed a materialman's lien on them under Fla. Stat. Ann. § 713.08 (West 2000), and subsequently sued Bonaventure in Florida court to foreclose on that lien. Pet. App. 2a. Petitioner's state foreclosure suit concluded in a consent decree in which Bonaventure agreed to assist petitioner in voluntarily repossessing the appliances. *Ibid.* By that time, however, Bonaventure had also defaulted on its mortgage, and HUD had taken possession of the project, including the appliances. *Ibid.* HUD, which was not a party to the state-court suit or to the consent decree, refused to consent to petitioner's repossession of the appliances. *Ibid.*

2. Petitioner filed the present action against HUD in Florida court seeking replevin of the appliances. Pet. App. 3a. Before service of the complaint upon HUD, petitioner posted a $300,000 bond and secured an *ex parte* prejudgment writ of replevin from the state court. *Id.* at 3a-4a, 31a. Petitioner then repossessed the appliances and sold them to a third party in a private sale for $119,240. *Id.* at 4a, 31a-32a.

The government thereafter removed the action to federal district court, answered, and counterclaimed for conversion, abuse of process, and wrongful replevin. Pet. App. 4a. Initially, the district court (Ungaro-Benages, J.) dismissed petitioner's claim and granted summary judgment for the government. *Id.* at 27a-40a. It held that petitioner's claim was barred by sovereign immunity because petitioner sought to foreclose a lien within the meaning of 28 U.S.C. 2410 and had failed to comply with that provision's waiver of immunity by not seeking a judicial sale.[1] Pet. App. 33a-34a.

Petitioner then amended its complaint, and the case was transferred to a different district judge. Pet. App. 5a (Ferguson, J.). The court ordered summary judgment for petitioner and dismissed HUD's counterclaims. *Id.* at 20a-26a. The court agreed with petitioner

---

[1] Section 2410 provides in relevant part:

> (a) Under the conditions prescribed in this section and section 1444 of this title [providing for removal of actions by the United States] for the protection of the United States, the United States may be named a party in any civil action or suit in any district court, or in any State court having jurisdiction of the subject matter—
>
> (1) to quiet title to, [or]
>
> (2) to foreclose a mortgage or other lien upon,
>
> * * * * *
>
> real or personal property on which the United States has or claims a mortgage or other lien.
>
> * * * * *
>
> (c) * * * However, an action to foreclose a mortgage or other lien, naming the United States as a party under this section, must seek judicial sale.

28 U.S.C. 2410(a) and (c).

that this action should be characterized under 28 U.S.C. 2410(a) as a suit to quiet title, not an action to foreclose a lien, so that the judicial-sale requirement of Section 2410(c) was inapplicable. Pet. App. 22a-23a. It also held that "the issue of right of possession of the appliances was settled" in petitioner's prior state-court foreclosure action against Bonaventure and that HUD was bound by the consent decree—even though it was not a party to that suit—because it had not moved to intervene and to reopen the decree. *Id.* at 24a.

The district court next granted the government's motion to vacate its decision granting summary judgment to petitioner. Pet. App. 16a-19a. This time, the court held that petitioner did not have a right to replevin the appliances because they were outside the scope of Florida's materialman's lien statute, Fla. Stat. Ann. §§ 713.001 *et seq.* (West 2000 & Supp. 2002). Pet. App. 18a. That statute, the court held, permits replevin only of "materials," defined as goods to be incorporated into an improvement, *i.e.*, a structure, that have not yet been so incorporated. *Ibid.*; see Fla. Stat. Ann. § 713.01(7) (West Supp. 2002); *id.* § 713.15 (West 2000). The appliances at issue were never "intended to be incorporated" because they "need only be plugged in to be operative," the court stated. Pet. App. 18a. The court also held that petitioner retained no title to the property and sustained "HUD's claims of a superior security interest." *Id.* at 19a.

Petitioner sought relief from this order, and the district court again reversed itself. Pet. App. 13a-14a. Its final order stated without elaboration that its previous order granting summary judgment to petitioner was correct. *Id.* at 14a.

3. On the government's appeal, the Eleventh Circuit reversed and remanded for dismissal of petitioner's

action and entry of judgment for HUD on its counterclaims for conversion and wrongful replevin. Pet. App. 1a-12a. The court of appeals first recognized that this Court has held that 28 U.S.C. 2410 is "the only way in which the United States can be joined" in a foreclosure action and the conditions that Section 2410 imposes on the waiver of sovereign immunity "must be strictly observed." Pet. App. 7a (quoting *United States* v. *John Hancock Mut. Life Ins. Co.*, 364 U.S. 301, 303, 306 (1960)). The court of appeals then rejected petitioner's argument that it was exempt from the judicial-sale requirement of Section 2410(c) because its action was to quiet title to the appliances, not to foreclose a lien. The court held that Fla. Stat. Ann. § 713.15 (West 2000), under which petitioner claimed its materialman's interest, "creates a lien-like right in the materials" and that petitioner "does not claim that it had title to the appliances while they were in Bonaventure's and HUD's possession." Pet. App. 8a. In addition, the court noted that under Florida law replevin "is strictly a possessory action where the sole legal issue is the right of immediate possession, not ownership or title." *Id.* at 9a (quoting *Williams Mgmt. Enters., Inc.* v. *Buonauro*, 489 So. 2d 160, 164 (Fla. Dist. Ct. App. 1986)). Finally, the court held that, because petitioner "was statutorily barred from bringing a replevin action against the United States by not seeking a judicial sale of the appliances," HUD was entitled to judgment on its counterclaims for conversion and wrongful replevin. *Id.* at 11a. It remanded for a determination of the appropriate remedies. *Id.* at 12a.

ARGUMENT

The unreported decision of the court of appeals is interlocutory, correct, and does not conflict with any

decision of this Court or of any court of appeals. In addition, petitioner's arguments in favor of certiorari are premised on a misunderstanding of the court of appeals' decision. Accordingly, further review by this Court is not warranted.

1. This Court's customary practice is to "await final judgment in the lower courts before exercising [its] certiorari jurisdiction." *Virginia Military Inst.* v. *United States*, 508 U.S. 946, 946 (1993) (opinion of Scalia, J., respecting denial of certiorari); see, *e.g.*, *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) (per curiam). There is no reason for the Court to depart from—and strong reasons for the Court to follow—that practice in this case.

The court of appeals reversed the district court's grant of summary judgment in favor of petitioner and remanded for dismissal of petitioner's replevin action and entry of judgment in favor of HUD on its counterclaims for conversion and wrongful replevin. It also remanded for "a determination of appropriate remedies." Pet. App. 12a. The district court's resolution of the remaining remedial issues in this case could influence the Court's decision whether to grant review of the question presented in the petition, and the pendency of those issues counsels against piecemeal review of petitioner's claim at this time. See *Virginia Military Inst.*, 508 U.S. at 946 (Scalia, J., respecting the denial of certiorari) (noting appropriateness of denying interlocutory petition where court of appeals remanded "for determination of an appropriate remedy").

2. Even if petitioner's claim were not premature, review by this Court still would be unwarranted.

a. Petitioner mistakenly contends (Pet. 17-23) that the decision below creates a conflict with the decisions of five other courts of appeals regarding 28 U.S.C.

2410(a) as to what constitutes a quiet-title action and is thus exempt from the judicial-sale requirement, and what constitutes an action to foreclose a lien and is thus subject to the judicial-sale requirement. Contrary to petitioner's contentions, however, the court of appeals did not rule broadly that *all* actions involving priority of liens, including tax liens, are foreclosure actions subject to the judicial-sale requirement. Rather, the court of appeals held only that the replevin action provided for by Florida law, which by its terms concerns only "the right of immediate possession, not ownership or title," is not an action to quiet title under Section 2410(a). Pet. App. 9a (citation omitted). Nothing in its decision dealt with the status of tax liens or disputes about the priority of liens under the statute, and *none* of the decisions petitioner cites to support its conflict argument holds or suggests that the judicial-sale requirement is inapplicable to a replevin action.

Two cases upon which petitioner relies (Pet. 17 n.10) held that the quiet-title provision provides jurisdiction where a plaintiff seeks a declaration that its property interest has priority over a government tax lien, but does not seek the remedy of a foreclosure sale. *Progressive Consumers Fed. Credit Union* v. *United States*, 79 F.3d 1228 (1st Cir. 1996); *United States* v. *Morrison*, 247 F.2d 285 (5th Cir. 1957). Two other cases held that actions to remove the cloud cast on the title to property by federal tax liens were also quiet-title actions. *Estate of Johnson* v. *United States*, 836 F.2d 940 (5th Cir. 1988); *United States* v. *Coson*, 286 F.2d 453 (9th Cir. 1961). In addition, *Harmon* v. *United States*, 101 F.3d 574 (8th Cir. 1996), held that the quiet-title provision waives sovereign immunity in a declaratory judgment action to quiet title to the proceeds of a sale of real property in a bankruptcy proceeding. The final

case upon which petitioner relies, *Harrell* v. *United States*, 13 F.3d 232 (7th Cir. 1993), held that a taxpayer's challenge to a levy imposed by the Internal Revenue Service against wages that he had earned but which had not yet been transferred to the government was within the scope of the quiet-title provision.

None of the cases cited by petitioner supports its argument that a replevin claim should also be characterized as a quiet-title action, and nothing in the court of appeals' decision in this case conflicts with the holdings of those cases. As the court of appeals below noted, petitioner sought replevin under Fla. Stat. Ann. §§ 78.01 and 713.15 (West 2000), and under Florida law replevin "is strictly a possessory action where the sole legal issue is the right of immediate possession, not ownership or title." Pet. App. 3a, 9a (citing *Williams Mgmt. Enters., Inc.* v. *Buonauro*, 489 So. 2d 160, 164 (Fla. Dist. Ct. App. 1986)). The court of appeals further noted that, in contrast to a quiet-title action, petitioner "does not claim that it had title to the appliances while they were in Bonaventure's and HUD's possession" and that, in fact, petitioner had stipulated in the consent judgment in the previous state court lien-foreclosure action "that Bonaventure was the beneficial owner of the appliances." Pet. App. 8a & n.6. Moreover, the court observed that petitioner "did not acquire a statutory lien on the appliances until the abandonment of the Bonaventure project, which it then could enforce by either repossession or replevin." *Id.* at 8a-9a. The court thus concluded that Florida's replevin action "is similar to a lien foreclosure action [rather than an action to quiet title] inasmuch as title may be revested in a one-time owner of property who transfers title to a purchaser but retains a security interest in the property." *Id.* at 9a.

In sum, *none* of the cases on which petitioner relies holds or suggests that a party can do what petitioner did here: *i.e.*, assert jurisdiction under Section 2410(a) to sell replevined property in a private sale, despite the express requirement in Section 2410(c) for a judicial sale. The judicial-sale requirement is an important safeguard because it enables the government to protect its interest by bidding at the sale. See Pet. App. 35a. The court below, therefore, correctly held that its decision did not conflict with *Progressive* or *Morrison* (*id.* at 10a), and it does not conflict with any of the other decisions petitioner cites.[2]

b. Petitioner also contends (Pet. 24-26) that the decision below conflicts with this Court's decisions on sovereign immunity. The decision below, however, does not implicate any of those well-settled principles. Rather, the court below simply and correctly held that petitioner's replevin action is one to foreclose a lien, not to quiet title.

---

[2] Petitioner also asserts that the decision in this case conflicts with five district court decisions. Pet. 16 & n.9. Those cases are also distinguishable because none of them involved the private sale of replevined property. In any event, a conflict between the decision below and a district court decision would not warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General
ROBERT D. MCCALLUM, JR.
Assistant Attorney General
ANTHONY J. STEINMEYER
Attorney

APRIL 2002